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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JACOB WAYNE HUTCHINS, Defendant and Appellant.	A092450 (Napa County Super. Ct. No. CR34914)

A jury convicted appellant Jacob Wayne Hutchins of second degree murder and shooting at a person from a motor vehicle. In addition, the jury found true several special allegations made in connection with those counts, including that appellant had committed the crimes to benefit a criminal street gang, and had personally and intentionally discharged a firearm proximately causing great bodily injury. The court sentenced him to a total unstayed prison term of 42 years to life. On appeal, appellant contends: (1) the jury instruction given by the trial court in accordance with CALJIC No. 17.41.1 was constitutionally deficient and we must therefore reverse his conviction; (2) the trial court violated Penal Code section 654[1] in imposing the additional statutory term of 25 years to life under section 12022.53 on the basis of the enhancement finding that appellant's personal and intentional discharge of a firearm had proximately caused great bodily injury to the victim; (3) the trial court erroneously failed to award appellant presentence conduct credits; and (4) the trial court imposed an unauthorized 2-year gang-related sentencing enhancement under section 186.22.

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I, II, and V.

1 Unless otherwise indicated, all further statutory references are to the Penal Code.

On the basis of our review of the entire record we conclude that any potential error arising from the trial court's use of the controverted instruction pursuant to CALJIC No. 17.41.1 was harmless beyond a reasonable doubt. We agree with appellant that the trial court erred in denying him presentence conduct credits under the authority of current section 190, subdivision (e), which was not in effect at the time appellant committed the offenses at issue. On the People's concession, we strike the two-year section 186.22 gang enhancement. In all other respects we affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND*

On the late afternoon of May 16, 1998, G. E. and Michael A. (the deceased) parked at the curb on Brown Street near H Street and Lincoln Avenue in Napa to fix a flat tire on G. E.'s Buick Riviera.[2] Within a period of approximately three-hours, at least five additional people appeared on the scene in a white Ford Escort to assist in replacing the flat tire on the Riviera. While the group was occupied with the car, a gray Chevrolet Caprice stopped at the stop sign at the corner for a period of time, and then raced by. The Caprice was driven by Robert C. and was occupied by three passengers: Manuel A., O. M. and J. M. Gang-related gestures and insults were exchanged between the group standing around the Riviera (identified as being associated with the Nortenos street gang) and those in the Caprice (identified as being associated with the Surenos street gang), although the evidence was in dispute as to which individuals on either side were making the challenging remarks and gestures.

Shortly thereafter, the gray Caprice returned with another car, a white Monte Carlo. As the two cars drove slowly by the group standing around the Riviera, gang-related hand signals were flashed and epithets were shouted out. Gunshots were fired from the right front passenger side of the Monte Carlo. Appellant, who had a loaded.22-caliber semiautomatic Ruger in his possession and was known to have had

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* See footnote, *ante*, page 1.

[2] In view of the gang-related nature of the crime, where possible all participants and witness will be identified by their initials only. First names will be used only where necessary to avoid confusion between participants with the same initials.

such a gun in the past, was seated in the front passenger seat of the Monte Carlo. There were three other persons in the car: J. M. (the driver), Manuel A., and Reyes C. Witnesses saw appellant holding a gun out the window of the Monte Carlo, and also heard shots being fired from the car. There was also gunfire from the Caprice, driven by Robert C., and in which Pedro and Pablo C., O. M., and G. A. were occupants. After the shooting, appellant yelled "Let's get the fuck out."

As the Caprice and the Monte Carlo drove away, most of the group of people who had gathered around the Riviera fled in all directions. Michael A. had been shot. Some of the group tried unsuccessfully to load him into a car. When the police arrived, Michael A. was lying on the street with this feet in the car. A total of eight bullet casings were in the roadway and an adjacent driveway. All the bullet casings had been fired by the same weapon. Michael A. was taken to the hospital, where he was pronounced dead at 9:12 p.m. The cause of his death was a gunshot wound to the head. The bullet was recovered and given to the police. It was consistent with having been fired from a Ruger exactly like a stolen Ruger known to have been in appellant's possession.

After the shooting, the Ruger appellant had used, together with a second gun in the possession of one of the participants, were disposed of by being thrown into a creek. Appellant was arrested at the home of one of the participants in the incident the next morning. This was the same residence from which the Surenos occupants of the Caprice and the Monte Carlo had set out to confront the Nortenos group around the Riviera on Brown Street. Evidence was admitted that appellant had been a member of a street gang known as the "Folks" or "Gangster Disciples" while in Alabama; was strongly associated with the Surenos gang, despite the fact he was not himself Hispanic or Latino; and had participated in another Surenos gang-related attack on the home of G.E. (the owner of the Riviera) about 10 days prior to the present incident. At the time of his arrest, appellant denied any involvement in the shooting, asserting he had not been present at all.

In his own testimony at trial, appellant admitted being present at the incident and firing a gun into the crowd around the Riviera. He claimed to have been under the influence of LSD, and denied any intention to shoot any one. According to appellant, he

fired the gun when he saw what looked like a laser-sighted gun aimed at himself. He admitted having lied to the police at the time of his arrest by denying any involvement in the shooting incident. Appellant also admitted having a Ruger pistol which he carried for protection and had with him at the time of the incident; having a criminal record for vandalism and tagging in both Alabama and California; using the name "Two Bit"; and associating on a social basis with Surenos gang members. However, he denied ever having been a member of a gang in Alabama, or having any specifically gang-related involvement with the Surenos gang in California. He asserted there was no significance to the fact he had on at least one occasion been photographed wearing a blue shirt (the Surenos color) and flashing a gang sign.

On rebuttal, the prosecution introduced evidence of an earlier incident in 1997 in which appellant was seen to throw a pistol and a Halloween mask into some bushes near an open store before approaching police and giving a false name and information. When asked by the police to come with them to look into the bushes, appellant ran away. After he was apprehended, appellant denied putting the mask and the gun in the bushes. A supervisor in the Napa County Juvenile Hall testified that while appellant was being held alone in a waiting room at the facility, he heard a scraping sound coming from the room in which appellant was alone. When the supervisor checked, he found previously nonexistent Surenos gang-related graffiti on a surface in the room. Appellant denied making the markings. Appellant's probation officer testified that in 1997, appellant told her he had been involved with a gang in Alabama and had become involved with Surenos in the Napa and Sacramento areas upon his arrival in California. One of the prosecution's experts on California gang activities testified that, based on appellant's testimony, letters from jail, and other evidence, he concluded that appellant was a "strong associate" of the Surenos gang. The parties stipulated that blood drawn from appellant at 9:30 a.m. on the morning after the incident tested negative for the presence of LSD.

Along with three codefendants, appellant was charged with murder (§ 187, count 1) and shooting from a motor vehicle (§§ 12034, subd. (c), counts 2 and 3; § 12034, subd. (d), counts 4 and 5). The information alleged that appellant and his codefendants

committed the murder to benefit a criminal street gang (§ 186.22, subd. (b)(1)); during the commission of the crime appellant and one codefendant personally used a firearm (§ 12022, subd. (d)); appellant and one codefendant had personally and intentionally discharged a firearm (§ 12022.53, subds. (c), (e)(1)); appellant and his codefendant's personal and intentional discharge of firearms proximately caused great bodily injury (§ 12022.53, subd. (d)); and the shooting from a motor vehicle was committed by appellant and his codefendants to benefit a criminal street gang, and with the personal and intentional discharge of a firearm proximately causing great bodily injury to the victim of the shooting (§§ 186.22, subd. (b)(1), 12022, subd. (d) , 12022.53, subds. (d),(e)(1)). Appellant pleaded not guilty.

The trial court severed the trials of appellant and his three codefendants, but ordered the trials to proceed together with four separate juries. Presentation of evidence in appellant's jury trial commenced on March 14, 2000, and ended on April 18, 2000. On May 2, 2000, the trial court granted the prosecution's motion to dismiss the charges of shooting from a motor vehicle reflected in counts 3 through 5.

Jury deliberations commenced on May 3, 2000. The next day, the jury unanimously found appellant guilty of second degree murder (count 1) and shooting from a vehicle at a person (count 2), and found true the special allegations made in connection with those counts.

The trial court sentenced appellant to a total term of 42 years to life in state prison, as follows: 15 years to life on count 1, plus consecutive terms of 2 years on the enhancement finding appellant had committed the offense for the benefit of a criminal street gang (§§ 186.22, subd. (b), 187, 189); and 25 years on the enhancement finding that during the commission of the murder appellant personally and intentionally discharged a firearm proximately causing great bodily injury to the victim of the shooting (§ 12022.53, subd. (d)). The trial court also imposed a consecutive sentence of 20 years on the count 1 enhancement finding that during the commission of the murder appellant personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), but stayed that sentence pursuant to section 654. The trial court imposed no sentence on the count 1

enhancement finding that appellant had personally used a firearm during the commission of the murder (§ 12022.53, subd. (b)). As to the count 2 conviction for shooting from a motor vehicle, the trial court sentenced appellant to a total prison term of 32 years, including terms for enhancements. However, the trial court stayed the entire sentence on count 2 pursuant to section 654. This appeal timely followed.

II. USE OF CALJIC NO. 17.41.1 WAS NOT PREJUDICIAL IN THIS CASE*

Appellant's initial contention concerns the trial court's use of the CALJIC No. 17.41.1 instruction on juror misconduct. At issue is the following jury instruction, as given by the trial court at the conclusion of trial: "The integrity of a trial requires that jurors at all times during their deliberations conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate, or expresses an intention to disregard the law, or to decide this case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation."

Appellant contends the giving of this jury instruction violated his rights to due process and to a fair jury trial under the federal and state Constitutions, as well as the jurors' constitutional rights to freedom of speech and association. Specifically, he asserts the instruction impermissibly undermines the independence of the jury by rendering the privacy of jury deliberations a fiction, thereby stifling free and open discussion, intimidating individual jurors into suppressing their opinions, and discouraging them from deciding a case based on their conscience and independent judgment. In addition, appellant contends the instruction "impermissibly infringes on the power of any juror or all of them to disregard the law in a given case and deliver a verdict in accord with their conscience," thereby undermining the jury's asserted power of "nullification." Appellant urges that because the effect of the allegedly erroneous instruction "tainted the entire jury deliberation process," it constituted a structural defect in the integrity of the trial for which reversal of the judgment is required, without resort to any analysis of prejudice.

* See footnote, *ante*, page 1.

Since its publication in 1998, CALJIC No. 17.41.1 has resulted in a split of appellate opinion regarding whether its use violates a defendant's constitutional rights. Our Supreme Court currently has this issue under review. (See *People v. Engelman* (2000) 77 Cal.App.4th 1297, review granted Apr. 26, 2000, S086462; *People v. Taylor* (2000) 80 Cal.App.4th 804, review granted Aug. 23, 2000, S088909; *People v. Morgan* (2001) 85 Cal.App.4th 34, review granted Mar. 14, 2001, S094101.) Without joining in the debate over the constitutionality of CALJIC No. 17.41.1, in this opinion we shall assume that the disputed instruction should not have been given. The remaining questions to be decided are whether the error was reversible per se or instead subject to harmless error analysis; and, if the latter, whether reversal is required under the facts of this case. (*People v. Molina* (2000) 82 Cal.App.4th 1329, 1331-1336.)

Before considering these issues, we must first note that the trial court gave the subject instruction without any objection from appellant or his attorney. We must therefore address the threshold question whether by failing to object to the subject instruction in the trial court, appellant has already waived any asserted error in the use of this instruction.

A defendant will generally be precluded from raising an error on appeal where, by conduct or inaction amounting to acquiescence in the action taken, he or she has waived the right to attack it. Nevertheless, an appellate court may review alleged instructional error, even though no objection was made in the trial court, if the "substantial rights of the defendant were affected thereby"; that is, unless the asserted instructional error resulted in a miscarriage of justice such that it was reasonably probable that the defendant would have obtained a more favorable result in the absence of the instructional error. (Cal. Const., art. VI, § 13; § 1259; *People v. Green* (1980) 27 Cal.3d 1, 27-29, 34, overruled on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 241; *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249; *People v. Arredondo* (1975) 52 Cal.App.3d

973, 978.)[3] The task of ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires that we examine the merits of the claim, at least to the extent of determining whether the asserted error resulted in any prejudice to the defendant. "Accordingly, . . . an appellate court may ascertain whether the defendant's substantial rights will be affected by the asserted instructional error and, if so, may consider the merits and reverse the conviction if error indeed occurred, even though the defendant failed to object in the trial court." (*People v. Andersen, supra,* 26 Cal.App.4th at p. 1249.) We therefore proceed to the question whether the asserted error of instructing the jury in accordance with CALJIC No. 17.41.1 prejudicially affected appellant's substantial rights.

At the outset of our inquiry, as noted, appellant attempts to trump any analysis of prejudice by contending the presumed error constituted a "structural defect" which was reversible per se. As the United States Supreme Court has made clear, however, most constitutional errors—including most instructional errors—are subject to harmless-error analysis. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279-281; *Arizona v. Fulminante* (1991) 499 U.S. 279, 306-310; *Pope v. Illinois* (1987) 481 U.S. 497, 503; *Rose v. Clark* (1986) 478 U.S. 570, 579-581.) Indeed, the high court has broadly stated as a general rule that "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong *presumption* that any other errors that may have occurred are subject to harmless error analysis. The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a

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[3] Section 1259 provides: "Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."

reasonable doubt, the interest in fairness has been satisfied, and the judgment should be affirmed." (*Rose v. Clark, supra,* 478 U.S. at p. 579, italics added.)

Thus, reversal per se is warranted only by "structural defects in the constitution of the trial mechanism . . . affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." (*Arizona v. Fulminante, supra,* 499 U.S. at pp. 309-310.) Examples of structural error include complete denial of the right to a jury trial, total deprivation of the right to counsel at trial, a biased judge, unlawful exclusion of members of the defendant's race from a grand jury, denial of the right to self-representation at trial, denial of the right to a public trial, or a constitutionally deficient instruction on the standard of reasonable doubt. In each of these cases, the given error renders it structurally impossible for the criminal trial reliably to serve its function as a vehicle for the determination of guilt or innocence according to the standard of proof beyond a reasonable doubt. (*Ibid*.; *Rose v. Clark, supra,* 478 U.S. at p. 578; *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.)

We reject appellant's contention that the presumed error in this case was structural error and reversible per se. CALJIC No. 17.41.1 simply requires jurors to inform the court of juror misconduct. The instruction does not affect the framework within which the criminal trial proceeds, and does not render the trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence beyond a reasonable doubt. Neither do we believe the instruction is likely to be coercive. "Absent misconduct by the jury, expressly identified in the instruction, the instruction is not likely to enter into jury deliberations at all. In the vast majority of cases, there is no jury misconduct. We do not see how an instruction that is not likely to come into play in most cases can constitute structural error requiring the reversal of every case in which it is given." (*People v. Molina*, *supra*, 82 Cal.App.4th at p. 1335.)

Accordingly, we conclude any error in instructing the jury in accordance with CALJIC No. 17.41.1 is not reversible per se, but rather is subject to harmless error analysis. We further assume for purposes of this opinion that the applicable standard of prejudice is that most favorable to appellant, i.e. the more rigorous federal constitutional

standard of review requiring us to determine whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24; see *People v. Flood* (1998) 18 Cal.4th 470, 492-494, 504; *People v. Molina*, *supra*, 82 Cal.App.4th at pp. 1332, 1334-1336.) Applying the *Chapman* standard to the record before us, we conclude there was no miscarriage of justice in this case because any error in giving the instruction was harmless beyond a reasonable doubt.

The record shows that after receiving final jury instructions, the jury retired to deliberate at 10:15 a.m. on May 3, 2000. The jurors were excused for lunch at 12:00 noon; deliberations recommenced at 1:30 p.m. Shortly thereafter, the court called in the jurors to respond to their questions concerning the instructional definitions of murder and their request for a readback of appellant's trial testimony. The trial court briefly advised the jurors that although a readback of appellant's trial testimony would take as long as the original testimony, it would arrange for such a readback if after further consideration the jury felt it needed one; alternatively, the court offered to send the jury a written transcript of appellant's testimony. It then ordered the jury to continue deliberations. At 2:20 p.m., the jurors were excused until the next day at 8:30 a.m.

The jury recommenced deliberations at 8:30 a.m. on May 4, 2000, with discussions between the trial court and counsel outside the jury's presence on how to respond to the jury's questions and desire for a readback. Shortly before 9:00 a.m., the court briefly reconvened in the jury's presence. The trial court read an additional instruction in response to the jury's question for further definition of the concept of conscious disregard for human life, and advised the jurors that a particular exhibit they had requested had not been received into evidence and therefore could not be provided to them. After the trial court again informed the jurors they could have a full readback of all of appellant's testimony if they chose, the jury foreman indicated that the jurors were still undetermined whether they needed to have such a readback. The jury then retired to continue deliberations. An hour break was taken for lunch.

In the interim, the court received several jury notes requesting a readback of identified portions of appellant's testimony, asking for "an elaboration" of the difference between first and second degree murder and the meaning of "intent," and seeking permission to "go back to the scene of the crime." At approximately 1:00 p.m., the court responded to the jury's notes in writing, advising that a return visit to the crime scene could be arranged, under controlled circumstances. At 2:45 p.m., the court reconvened outside the jury's presence to inform counsel of how it had responded to the jury's request regarding the crime scene, and to discuss possible responses to the jury's other questions. At 4:10 p.m., the trial court advised both counsel and appellant that at approximately 3:40 p.m., it had received a note from the jurors stating that they did not need to revisit the crime scene or obtain any further assistance. At 4:15 p.m., the jury returned with its verdict of guilty on both remaining counts. The court polled the individual jurors, who unanimously confirmed the verdict of guilty. The trial court thanked and discharged the jury at 4:35 p.m.

On the record before us, we conclude beyond a reasonable doubt that the challenged instruction did not contribute to the jury's verdict. Appellant admitted being in the drive-by car with the other gang members, firing his gun in the direction of a group of people which included the deceased, and then lying to the police about his involvement at the time of his arrest. The overwhelming witness testimony was more than sufficient to establish beyond a reasonable doubt the elements of the offenses on which the jury was instructed, including appellant's connection with a street gang and his criminal intent.

With regard to the alleged effect of the instruction on the dynamics of the jury deliberations, the record shows none. There is no indication the jury had any difficulty arriving at a guilty verdict, or that it was ever deadlocked. The jury deliberated a total of approximately 2 hours and 30 minutes on May 3, 2000, before being excused for the day. On May 4, 2000, the jury returned to deliberate approximately 6 hours and 15 minutes longer before returning a verdict. The entire elapsed time from the beginning of jury deliberations on May 3, 2000, to their completion the next day was thus approximately 8

hours and 45 minutes. There is no suggestion or report of any "holdout" juror refusing to deliberate, and no evidence any juror expressed an intention either to disregard the law or to decide the case based on penalty or any other improper basis. In view of the tremendous length and complexity of this trial, which lasted over a month and involved scores of witnesses, the amount of time spent in jury deliberations was remarkably short.

"We reject [appellant's] speculative assumption that the instruction had a chilling effect on the jurors' deliberations, inhibiting the kind of free expression and interaction among jurors that is so important to the deliberative process. There is no warrant for that view on this record." (*People v. Molina, supra,* 82 Cal.App.4th at p. 1336.) There is no reasonable basis for any inference that the subject jury instruction had any impact prejudicial to appellant. We conclude any presumed error in giving CALJIC No. 17.41.1 was harmless beyond a reasonable doubt.

III. FAILURE TO STAY ENHANCEMENT PENALTY UNDER SECTION 654

In sentencing appellant on his second degree murder conviction, the trial court imposed an additional term of 25 years to life for personal and intentional discharge of a firearm proximately causing the death of the victim of the shooting, as required by section 12022.53, subdivision (d). The trial court was faced with an enhancement statute specifically setting out substantially increased prison sentences for the use of a firearm in the commission of designated felonies, including murder. (*People v. Martinez* (1999) 76 Cal.App.4th 489, 493; § 12022.53, subds. (a)(1), (d).) Appellant contends that by imposing both a 15-year to life term for the second degree murder and an additional enhancement penalty of 25 years to life pursuant to section 12022.53, subdivision (d), the trial court punished him twice for the same conduct—firing the shots that killed the deceased victim. Thus, he insists the trial court's imposition of the additional statutory term was in violation of section 654, because he had already been punished for murder under count 1 "for precisely the same act that constituted this enhancement." Appellant is wrong.

Section 654, subdivision (a), states: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that

provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other." The purpose of this statute is to prevent multiple punishment for a single act or omission, even though that act or omission violates more than one statute and thus constitutes more than one crime. Although these distinct crimes may be charged in separate counts and may result in multiple verdicts of guilt, the trial court may impose sentence for only one of the separate offenses arising from the single act or omission—the offense carrying the highest punishment. (*Neal v. State of California* (1960) 55 Cal.2d 11, 18-21; 3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, §§ 129, 149, pp. 191-193, 213-215.)

Each case must be determined on its own circumstances. (*People v. Perez* (1979) 23 Cal.3d 545, 551; *People v. Beamon* (1973) 8 Cal.3d 625, 630-639.) The question whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination. Its findings on this question must be upheld on appeal if there is any substantial evidence to support them. (*People v. Coleman* (1989) 48 Cal.3d 112, 162; *People v. Nichols* (1994) 29 Cal.App.4th 1651, 1657; *People v. McGuire* (1993) 14 Cal.App.4th 687, 698; *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1408.) "We must 'view the evidence in a light most favorable to the respondent and presume in support of the [sentencing] order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]' [Citation.]" (*People v. McGuire*, *supra*, 14 Cal.App.4th at p. 698.)

The plain language of the statute at issue in this case, section 12022.53, mandates imposition of the additional enhancement sentence. Thus, the statute clearly and unambiguously states that "*[n]otwithstanding any other provision of law*, any person who is convicted of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 12034, and who in the commission of that felony intentionally and personally discharged a firearm and proximately caused great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, *shall be punished* by a term of

imprisonment of 25 years to life in the state prison, *which shall be imposed in addition and consecutive to the punishment prescribed for that felony*." (§ 12022.53, subd. (d), italics added.)[4] Elsewhere the same statute specifically provides that "*[n]otwithstanding any other provision of law*," a trial court "*shall not*" suspend execution or imposition of sentence for any person found to come within the provisions of this enhancement statute, or strike any allegation or finding that brings a person within the provisions of this section. (§ 12022.53, subds. (g), (h), italics added.)[5]

Clearly, in enacting this provision the Legislature intended to *mandate* the imposition of substantially increased penalties where one of a number of crimes, including homicide, was committed by the use of a firearm. In so doing, the express language of the statute indicates the Legislature's intent that section 654 *not apply* to suspend or stay execution or imposition of such enhanced penalties. Nor should section 654 logically apply in such a situation. The manner in which any crime is accomplished may vary in innumerable respects. Thus, "[s]econd degree murder may be committed in a myriad of ways, some that involve use of a firearm, and others, such as stabbing, poisoning, or strangling, that do not involve use of this type of weapon." (*People v. Hansen* (1994) 9 Cal.4th 300, 317.) Section 654 is not implicated by the imposition of a sentencing enhancement on a particular manner of committing murder—with the use of a firearm—adjudged by society through its legislative representatives as particularly egregious and dangerous. What the Legislature has done by enacting section 12022.53 is not to punish the same single criminal act more than once or in more than one way. Instead, in determining that a criminal offender may receive additional punishment for

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[4] Murder is, of course, specified as one of the felonies to which this provision applies. (§ 12022.53, subd. (a)(1).)

[5] "Notwithstanding any other provision of law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any person found to come within the provisions of this section." (§ 12022.53, subd. (g).)
"Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." (§ 12022.53, subd. (h).)

any single crime committed with a firearm, the Legislature has chosen to enhance or expand the punishment imposed on a single underlying crime, where committed by use of a firearm, in order to deter a particular form of violence judged especially threatening to the social fabric.

This interpretation of section 12022.53 is supported by case law. In examining similar sentencing enhancement statutes directed at firearms use, the courts of appeal have specifically held that section 654 does not bar imposition of a single firearms use enhancement to an offense committed by the use of firearms, unless firearms use was a specific element of the offense itself. Indeed, where imposition of a firearms use enhancement is made *mandatory* notwithstanding other sentencing laws and statutes, it is *error* to apply section 654 to stay imposition of such an enhancement. (*People v. Ross* (1994) 28 Cal.App.4th 1151, 1155-1160; accord, *People v. Myers* (1997) 59 Cal.App.4th 1523, 1529-1534; see also *People v. Hansen*, *supra*, 9 Cal.4th at pp. 316-317.) In this case, as in *Ross, supra,* appellant's "use of the firearm was not a crime in and of itself. The crime was the extinction of a human life . . . . The gun was simply the method selected by [appellant] to accomplish the crime, and the particular method selected subjects [him] to an additional penalty. Because the underlying crime and the enhancement are not identical, there is and can be no double punishment under section 654." (*People v. Ross*, *supra*, 28 Cal.App.4th at p. 1159.)

Thus, the purpose of section 12022.53 is to deter persons from using firearms in the commission of specified felonies. In the case of subdivision (d) of that section, the statute's purpose quite specifically is to deter persons from inflicting great bodily injury or death through the intentional discharge of firearms in the commission of such felonies, the exact result of the offense which occurred here. "To refrain from imposing the enhancement would contradict the exact terms of the statute, preventing the imposition of the enhancement in many instances of murder, manslaughter and attempted murder, the most vicious results of [personally and intentionally] discharging a weapon [in the commission of a felony]. Imposing the enhancement fulfills the legislative purpose of punishing more severely those crimes which actually result in great bodily injury.

[Citation.]" (*People v. Myers, supra,* 59 Cal.App.4th at p. 1533.) Under appellant's interpretation of section 12022.53, where a victim dies from bullets fired in the commission of a felony, the person who pulls the trigger can never have the sentence enhanced pursuant to that statute. "This result would undermine the intent of the legislation, which was to punish such acts harshly." (*Ibid.*)

In short, we agree with respondent that the law is not punishing appellant twice for the same act; rather, the law is punishing him once each for the components of that act which make it so dangerous and anti-social. We conclude the trial court did not err in failing to apply section 654 to stay the section 12022.53, subdivision (d) enhancement found true in connection with appellant's conviction of second degree murder.

IV. FAILURE TO AWARD PRESENTENCE CONDUCT CREDITS

The trial court awarded appellant 788 days credit for time served while awaiting trial, but denied him any presentence good conduct credits under the authority of section 190, subdivision (e).[6] Appellant now contends the trial court erred in denying him an award of conduct credits on this basis. Appellant is correct.

Section 190 is the principal Penal Code provision on the punishment for murder. It was originally adopted by initiative (Proposition 7, the so-called "Briggs Initiative") at the General Election of November 7, 1978. In its current form, subdivision (e) of section 190 now states: "Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall *not* apply to reduce any minimum term of a sentence imposed pursuant to this section. A person sentenced pursuant to this section shall *not* be released on parole prior to serving the minimum term of confinement prescribed by this section." (Italics added.) Under this subdivision, then, a convicted murderer is not entitled to any credits available to others pursuant to section 2930 et seq., which set out provisions for prison time credits

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[6] As appellant correctly notes, the trial court actually based its ruling on section 192, subdivision (e). The cited subdivision of section 192 does not exist. The rest of that section 192 defines the crime of manslaughter, and is not relevant to this case. Apparently the trial court misspoke and intended to refer to section 190, subdivision (e). Our discussion is based on that assumption.

for good behavior, participation, and work time in prison. This language was adopted by the Legislature in 1996 and again in 1997. However, because section 190 was originally enacted by initiative, the Legislature was required to submit its adoption of these subsequent amendments to the electorate for approval. (Cal. Const., art. II, § 10, subd. (c); *In re Oluwa* (1989) 207 Cal.App.3d 439, 442-445.) In fact, the pertinent language of current subdivision (e) was not submitted to and approved by the voters until the election held on June 2, 1998. Only after this electoral approval did it become effective as of June 3, 1998. (Stats. 1996, ch. 598, § 1; Stats. 1997, ch. 413, § 1 (Prop. 222), approved June 2, 1998.)

Thus, the language of section 190 on which the trial court and the People rely—providing that the conduct credit provisions of Article 2.5 do *not* apply to reduce a sentence, and that a person sentenced for murder must serve the full length of his or her minimum term—did not go into effect until *after* the commission of the crime in this case on May 16, 1998. The version of section 190 still in effect in May 1998 at the time the murder in this case occurred actually read, in pertinent part, as follows: "Except as provided in subdivision (b), Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 *shall apply* to reduce any minimum term of 15, 20, or 25 years in the state prison imposed pursuant to this section, but the person shall not *otherwise* be released on parole prior to that time." (Former § 190, subd. (a), italics added; Stats. 1987, ch. 1006 (Prop. 67), approved June 7, 1988; Stats. 1993, ch. 609 (Prop. 179), approved June 7, 1994.)[7] Consequently, whatever limitations on presentence conduct credits are

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[7] The "subdivision (b)" referred to in the quoted section of former section 190, subdivision (a) set forth the punishment for persons found guilty of second degree murder of a peace officer engaged in the performance of his or her duties, and was clearly not applicable here.

In a footnote to his reply brief, appellant states that in his opening brief he had "mistakenly" identified former section 190, subdivision (a) as the provision applicable to this case; and he instead now cites former section 190, subdivision (c) as the applicable provision. Appellant was right the first time. Former section 190, subdivision (a) dealt with the punishment for *both* first degree murder (in the first paragraph) and second degree murder (in the second paragraph). The relevant portion of former section 190,

contained in the current version of section 190, subdivision (e), these did not became operative until June 3, 1998, upon the passage of Proposition 222 at the June 2, 1998, Primary Election. They cannot be applied to the present case involving a murder which took place on May 16, 1998, prior to the effective date of that statute. (§ 3; U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9; *Weaver v. Graham* (1981) 450 U.S. 24, 31; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287-294.)[8]

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subdivision (a) was the third paragraph quoted above, which applied to *both* first and second degree murder convictions. Former section 190, subdivision (c), provided a punishment of 20 years to life for second degree murder "perpetrated by means of shooting a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict great bodily injury." In language closely similar to that of section 190, subdivision (a), subdivision (c) went on to state that "Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 *shall apply* to reduce any minimum term of 20 years in the state prison when the person is guilty of murder in the second degree and is subject to this subdivision, but the person shall not otherwise be released on parole prior to that time." (Italics added.) Thus, whichever subdivision of former section 190 applied to appellant's offense, in either case the statute in effect provided that conduct credits *were* available to reduce his sentence.

[8] Section 3 states: "No part of [this Penal Code] is retroactive, unless expressly so declared."

Respondent avers that, "[a]s the People understand it," the language of former section 190 relied upon by appellant "was part of a Penal Code section 190 which was never implemented," and which "would have only gone into effect had the current edition of section 190 (an edition with the exact subdivision (e) as the May 1998 edition) not been approved by the voters in June 1998." Unfortunately, respondent is wrong. Respondent's confusion on this point is understandable, however. The ultimate operative effect of the competing amendments to section 190 awaiting voter approval between 1996 and 2000 is so confusing as almost to defy analysis. (See 47A West's Ann. Pen. Code (1999 ed.) § 190, pp. 177-188 & 2001 supp., pp. 17-18.)

Reference to a 1998 edition of the Penal Code clarifies the situation. The language of the statute actually in effect in May 1998 was that enacted by the Legislature in 1993, and approved by the voters on June 7, 1994, as Proposition 179. (Stats. 1993, ch. 609, § 3 (Prop. 179), effective June 8, 1994; see Deering's Ann Pen. Code. (2001 supp.) § 190, pp. 37-39.) As seen, this language was subsequently changed to bar the application of credits to convicted murderers by amendments enacted in 1997 but not effective until approval by the voters at the election of June 2, 1998, *after* the date appellant committed the offenses at issue in this case. (Stats. 1997, ch. 413, § 1 (Prop. 222), effective June 3, 1998.) The provisions to which respondent apparently refers were actually part of

Respondent contends that the trial court was justified in its refusal to award appellant any applicable presentencing conduct credits by the language of a separate provision, Section 2933.2, subdivision (a). That statute provides that "[n]otwithstanding Section 2933.1 or any other law, any person who is convicted of murder, as defined in Section 187, shall not accrue any credit, as specified in Section 2933." However, as respondent fails to point out, section 2933.2, subdivision (d) also states: "This section shall only apply to murder that is committed on or after the date on which this section *becomes operative*." (Italics added.) Like the current version of section 190, section 2933.2 was enacted by the Legislature in 1996, but required submission to the voters. (Stats. 1996, ch. 598, § 3; Stats. 1997, ch. 413, § 3.) Thus, it did not actually become effective until June 3, 1998, after it was approved by the electorate at the Primary Election of June 2, 1998—the same election at which the current language of section 190, subdivision (e) was approved as part of Proposition 222. In other words, neither current section 190, subdivision (e), nor section 2933.2, was in effect at the time of appellant's crimes, and neither statute can be used to justify a denial of presentence conduct credit to him in this case.

Accordingly, the case must be remanded with directions to the trial court to calculate and award appellant appropriate presentence conduct credits in accordance with the sentencing laws in effect in May 1998, prior to the passage of Proposition 222 in June 1998.[9]

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amendments to section 190 enacted by the Legislature in 1998, but not effective until *March 8, 2000*, after their approval by the voters as part of Proposition 19 at the primary election of March 7, 2000. (Stats. 1998, ch. 760, §§ 6, 11, 12; see Deering's Ann. Pen. Code, *supra*, § 190, pp. 37-39; 47A West's Ann. Pen. Code, *supra*, § 190, pp. 177-188, and 2001 supp., pp. 17-18.)

9 In ordering a remand for this purpose, we intimate no opinion on the question whether appellant is actually *entitled* to an award of any presentence conduct credit, or if so, how much. We simply hold that the trial court erred in citing the specific statutory basis of section 190, subdivision (e) for denying such an award of presentence credit.

V. TRIAL COURT WRONGLY APPLIED TWO-YEAR GANG ENHANCEMENT*

Finally, appellant contends the trial court wrongly imposed a sentence enhancement to his sentence for second degree murder pursuant to section 186.22, subdivision (b)(1), based on the connection of this offense to criminal street gang activity. Citing *People v. Ortiz* (1997) 57 Cal.App.4th 480, and *People v. Herrera* (1999) 70 Cal.App.4th 1456, appellant argues the subject statutory enhancement specifically does not apply to prisoners serving life sentences. He therefore asks that the enhancement be stricken, and the abstract of judgment modified to reflect a minimum parole eligibility date of 15 years, in accordance with former section 186.22, subdivision (b)(4), the provision applicable at the time this crime was committed.

Respondent agrees with this contention, and stipulates that the abstract of judgment be amended to strike the two-year enhancement as requested by appellant. Based on the cases cited, we concur. (Former § 186.22, subd. (b)(4); Stats. 1996, ch. 630, § 1, ch. 873, § 1, ch. 982, § 1; Stats. 1997, ch. 500, § 2; *People v. Ortiz, supra* 57 Cal.App.4th at p. 486; *People v. Herrera, supra,* 70 Cal.App.4th at p. 1465.)

VI. DISPOSITION

The abstract of judgment is ordered modified to strike the two-year enhancement imposed pursuant to former section 186.22, subdivision (b)(1), and to order that appellant not be paroled until he has served a minimum of 15 calendar years. The cause is remanded for the calculation and award of presentence conduct credit in accordance with the law in effect at the time of the offenses. In all other respects, the judgment is affirmed.

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McGuiness, P.J.

We concur:

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Corrigan, J.

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Parrilli, J.

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* See footnote, *ante*, page 1.

Trial Court:	Napa County Superior Court
Trial Judge:	Hon. W. Scott Snowden

Ward & Capriola and William J. Capriola, under appointment by the Court of Appeal for Plaintiff and Respondent

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Ronald A. Bass, Senior Assistant Attorney General, Rene A. Chaco n, Supervising Deputy Attorney General, Bruce Ortega, Deputy Attorney General for Defendant and Appellant

A092450, *People v. Hutchins*